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NO. 79-2063

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

W. L. McIlroy and James Dunlavey, As Executor of The Estate of Grady R. McIlroy ..... *Petitioners*

vs.

State of Arkansas, Ozark Society, and Wayfarer Expeditions, Inc. ..... *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Wayfarer takes issue with the two questions presented by Petitioners. The first question, alleging that the Supreme Court of Arkansas erred in finding the Mulberry River to be a navigable watercourse appears to involve appeal on the merits of the case and presents an issue not arising under 28 U.S.C. §1257(3). For that reason, the only question actually presented to this Court is as follows: Was the question of a violation of the Fifth Amendment to the United States Constitution which protects against the taking of property without due process of law and compensation properly raised and decided in the Arkansas Supreme Court therefore vesting this Court with jurisdiction. .

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Respondent, Wayfarer Expeditions, Inc., respectfully requests that the Petition for Writ of Certiorari filed herein by the Petitioners be denied.

JURISDICTION

Petitioner attempts to invoke this Court's jurisdiction to review the questions presented in their petition under 28 U.S.C. §1257(3). This respondent challenges the contention of Petitioner that this is a case which is a proper matter for review by Writ of Certiorari. This case does not question the validity of a treaty or statute of the United States nor is the validity of a state statute drawn in question as being repugnant to the Constitution, treaties or laws of the United States. Wayfarer submits that the alleged Federal

constitutional issue was inserted as a mere afterthought in the Petition for Rehearing filed by the Petitioners in the Arkansas Supreme Court on or about April 2, 1980. The Petition for Rehearing was denied on April 21, 1980. Wayfarer submits that by reason thereof the issue of violation of Fifth Amendment or Fourteenth Amendment rights as guaranteed by the United States Constitution were simply not raised nor litigated before the Franklin County Chancery Court nor the Arkansas Supreme Court. Furthermore, Wayfarer submits that there is not any conflict between the decisions herein cited and any prior decisions of the Arkansas Supreme Court; in fact, prior decisions of the Arkansas Supreme Court are completely and totally consistent with the result reached below. Therefore, this Respondent respectfully submits that this case does not present a proper matter for review by this Court by a Writ of Certiorari and the Petition should be denied.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1257(3):

By Writ of Certiorari, whether validity of a treaty or statute to the United States is drawn in question or whether validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

COUNTERSTATEMENT OF THE CASE

This litigation involves the navigability of the Mulberry River, a free-flowing and undammed Arkansas river rising in the Boston Mountains of Franklin County and flowing westerly a distance of 70 miles until it flows into the Arkansas River. Functionally, the Mulberry River may be termed as a typical clear water Ozark river having a rock and gravel bottom and populated by a variety of fish. The width and depth of the river varies. Generally, the Mulberry River has been utilized by the general public for recreational activities consisting of fishing, swimming, boating, and picnicking for a great number of years. The river has been canoed for some number of years and has relatively recently become quite popular with canoeists.

In 1967, the Petitioners acquired real property through which the streambed of the Mulberry River flows. At the point in issue, Petitioners own both sides of the river at that certain point where a concrete Franklin County bridge serves county road 219. The McIlroy property lies within the Ozark National Forest. This action originated when Petitioner filed an action for declaratory judgment praying for a Court order declaring the Mulberry River to be non-navigable at that point where it crosses the Petitioner's property. Petitioners sought a permanent restraining order prohibiting the Respondents and the public from floating or canoeing on the Mulberry River at the point where it crosses Petitioner's property. Respondents allege that, at the point in issue, the river was navigable and that the public had acquired the right to cross Petitioner's property by virtue of its having acquired a prescriptive easement by usage of the river in excess of seven years.

The Respondent, Wayfarer Expeditions, Inc., is a

Missouri corporation engaged in the business of renting canoes and offering a shuttle service along the Mulberry River in the State of Arkansas. The Ozark Society is a private non-profit conservation organization. The State of Arkansas intervened on the grounds that a declaration of of non-navigability would divest the State of title to the streambed and foreclose the public's right to use the Mulberry River.

This matter was tried before the Franklin County Chancery Judge who held that the Mulberry River is non-navigable, and, that the public had not acquired a prescriptive easement along the river upon the Petitioner's property. The Arkansas Supreme Court reversed on appeal, finding that the Mulberry River is navigable at that place where it flows through the Petitioner's lands with all incidental rights of that determination. After the adverse ruling by the Arkansas Supreme Court, Petitioners filed a Petition and Memorandum Statement requesting a rehearing before the Arkansas Supreme Court in which it was first alleged that Petitioner had been divested of title to property without due process of law and without compensation. Petitioner alleged that the ruling was contrary to the United States Constitution and to the Arkansas Constitution without specifying which portions of the United States Constitution or the Arkansas Constitution were relied on. After the Petition for Rehearing was denied by the Arkansas Supreme Court, Petitioners filed this instant action seeking a Petition for Writ of Certiorari to the Arkansas Supreme Court.

REASONS FOR DENYING THE WRIT

It has always been deemed to be essential to the jurisdiction of this Honorable Court under 28 U.S.C. §1257 (3) that a substantial Federal question has been properly raised in the State court proceedings. As stated in *Oxley Stave Co. v. Bulter County,* 166 U.S. 648 (1897) at page 655:

> ". . . the jurisdiction of this Court to re-examine the final judgment of a State court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such Court intended to assert a Federal right."

It is submitted that the questions now presented to this Court were never properly raised before the Franklin County Chancery Court nor before the Arkansas Supreme Court on the merits of the appeal. The issue arises, if at all, only by way of Petitioner's Petition for Rehearing to the Arkansas Supreme Court. This deficiency in and of itself is an adequate and compelling reason to deny the Petitioner's Writ of Certiorari. It has long since been established that the United States Supreme Court is vested with no jurisdiction unless a Federal question was raised and decided in the State court below. See generally, *Crowell v. Randall,* 10 Pet. 368 (1836); *Cardinale v. Louisiana,* 394 U.S. 437 (1969). It is undisputed that in Arkansas, an issue which is not been pleaded in the pleadings nor heard by the trial court will not be determined nor considered by the Arkansas Supreme Court for the first time on appeal. *Desha Bank & Trust Co. v. Quilling,* 118 Ark. 114, 176 SW 132 (1915); *Stroud v. Crow,* 209 Ark. 820, 192 SW2d 548 (1946).

Even if the issues raised may be deemed to be properly submitted to this Court, Wayfarer submits that there is no existing conflict in Arkansas decisions and that the matter must be affirmed on the merits. The Supreme Court found the Mulberry River as it passes through Petitioners' property, to be navigable as a matter of law. The attention of this Court is directed to the opinion of the Arkansas Supreme Court's set forth in Petitioner's Appendix at page A-8 where it observed that Arkansas has adopted the standard definition of navigability, citing *Lutesville Sand & Gravel Co. v. McLaughlin,* 181 Ark. 574, 26 SW2d 892 (1930). The Supreme Court observes that the test is similar to the one in usage in Federal courts and serves to define navigability in terms of a river's "potential for commercial usefulness. . . ." Thereafter, *Lutesville Sand & Gravel Co. v. McLaughlin, supra* above, is cited as follows:

> ". . . Nor is it necessary that the stream should be capable of floating boats or rafts the whole, or even the greater part of the year. Upon the other hand, it is not sufficient to impress navigable character that there may be extraordinary times of transient freshets, when boats might be floated out. For, if this were so, almost all insignificant streams would be navigable. The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise. If, in its natural state, without artificial improvements, it may be prudently relied upon and used for that purpose at some seasons of the year, recurring with tolerable regularity, then in the American sense, it is

> navigable, although the annual time may not be very long. Products may be ready and boats prepared, and it may thus become a very great convenience and materially promote the comfort and advance the prosperity of the community. But it is evident that sudden freshets at uncertain times cannot be made available for such purposes. No prudent man could afford the expense of preparation for such events, or could trust to such uncertainty in getting to market. The result of the authorities is this, that usefulness for purposes of transportation, for rafts, boats or barges, gives navigable character, reference being had to its natural state, rather than to its average depth the year round."

The Arkansas Supreme Court thereafter concludes at A-9 of Petitioner's Appendix that, "therefore, a river is legally navigable if actually navigable and actually navigable if commercially valuable.

In logical sequence, the Arkansas Supreme Court then cites *Barboro v. Boyle,* 119 Ark. 377, 178 SW 378 (1915) in recognition of the fact that rivers and the utilization of rivers would change in the future and that quite probably recreation would become of significant impact to the people and to the industries in Arkansas. In citing *Barboro,* the Arkansas Supreme Court observed the prophetic impact of the language, establishing a standard definition of navigability with its resulting dependence upon a commercial criteria. Appended at the Petitioner's brief at pages A-9 to A-10 the Court quotes *Barboro* as saying:

> "It is the policy of this State to encourage the use of its water courses for any useful or beneficial

purpose. There may be other public uses than the carrying on of commerce of pecuniary value. The culture of rice is being developed in this State and the waters of the lake could be used for the purpose of flooding the rice fields and for other *AGRICULTURAL PURPOSES*. As the population of the State increases, the banks of the lake may become thickly populated, and the water could be used for domestic purposes. Pleasure resorts might even be built upon the banks of the lake and the water might be needed for municipal purposes. *MOREOVER, THE WATERS OF THE LAKE MIGHT BE USED TO A MUCH GREATER EXTENT — FOR BOATING, FOR PLEASURE, FOR BATHING, FISHING AND HUNTING THAN THEY ARE NOW USED.*" [Emphasis added].

It is beyond dispute that Wayfarer is a Missouri corporation doing business in the State of Arkansas. Wayfarer's business has extra state ramifications and clearly constitutes, as a matter of common sense, a form of interstate commerce. Clearly any river which is susceptible to canoeing and other recreation activities is economically useful and, as a matter of fact, susceptible to and engaged in the business of interstate commerce. It is submitted that other states utilize susceptible recreational use of a river or streambed as a criteria for the establishment of navigability. See, *Attorney General v. Woods,* 108 Mass. 436 (1870); *State, ex rel. v. Newport Concrete Co.,* 44 Ohio App. 2d 121, 73 Ohio Ops. 2d 124 (1975); *Kelly, ex rel. MacMullan v. Hallden,* 51 Mich. App. 176, 214 NW2d 856 (1974); *People v. Mack,* 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); *Lamprey v. State,* 52 Minn. 181, 53 NW 1139 (1893); *Luscher v. Reynolds,* 153 Ore. 625, 56 P.2d 1158 (1936);

Branch v. Oconoto County, 13 Wis. 2d 595, 109 NW2d 105 (1961); *Curry v. Hill,* 460 P.2d 933 (Okla. 1969); *State v. Twiford,* 136 N.C. 603, 48 SE 586 (1904).

Inasmuch as Petitioners acquired their disputed title to the riverbed sometime after the decision in *Barboro v. Boyle,* supra above, and *Lutesville Sand & Gravel Co. v. McLaughlin,* supra above, it is submitted that Petitioner has lost nothing, has not been divested of title to the streambed, and, accordingly, cannot meritoriously argue the issue of the taking without just compensation.

Thus this Respondent respectfully submits that Petitioner's rights under the Fifth Amendment to the United States Constitution were in no way infringed by the action of the Supreme Court of Arkansas. Furthermore, this Respondent submits that the Petitioners have failed to establish jurisdiction in this Court pursuant to 28 U.S.C. 1257(3).

CONCLUSION

For all the above reasons, the Petition for Writ of Certiorari to the Arkansas Supreme Court should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James A. Penix, Jr., a member of the bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing brief of Respondent, Wayfarer Expeditions, Inc., have been served by mail by depositing the same in a United States mailbox with first class postage, prepaid, this —— day of August, 1980 duly addressed to the following: Thomas A. Martin, Jr. Esquire, Bay Fitzhugh, Esquire, Paul Means, Esquire, Howard Cockrill, Esquire, Jack T. Lassiter, Esquire and Ronald W. Metcalf, Esquire on August ——, 1980, at the addresses listed on pleadings previously filed with this Court.

/s/ James A. Penix, Jr.

OF JAMES A. PENIX, JR., P.A.

Counsel of record for Respondent, Wayfarer Expeditions, Inc.